Date: September 25, 1997

Case No.: 96-INA-70

In the Matter of:

WATHNE LTD.,
Employer

On Behalf Of:

JAIRO TORRES,
Alien

Appearance: Philip H. Teplen, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 27, 1994, Wathne Ltd. ("Employer") filed an application for labor certification to enable Jairo Torres ("Alien") to fill the position of Stock Supervisor (AF 3-4). The job duties for the position are:

> Directs processing of back room operations of clothing and luggage company, inventory deliveries, directs stock people in correct storage of merchandises and proper accessing of merchandise for delivery to customer, and maintains inventory and ship records by supplier, delivery carrier and cross[-]indexes to ultimate purchaser. Interfaces operations with sales staff so as to coordinate for timely ship dates. Travels between New York and New Jersey facilities regularly to supervise proper inventory processing. 60% of job spent at Jamesburg, N.J. facility and 40% at Manhattan, N.Y. facility. Requires valid drivers license.

The requirements for the position are two years of experience in the job offered and Other Special Requirements of "[a]vailability and willingness to work occasional weekends." The Alien will supervise three employees.

The CO issued a Notice of Findings on June 22, 1995 (AF 76-79), proposing to deny certification on the grounds that the Employer's requirement that the employee must work as a Stock Supervisor in Jamesburg, New Jersey, for 60 percent of the time, and in New York, New York, for 40 percent of the time, with a distance between these two cities of approximately 50 miles, appears excessive and restrictive in violation of § 656.21(b)(2). Additionally, the CO noted that the Employer is requiring two years of experience in the offered position, but the Alien had no experience in this occupation prior to his hire, which is a violation of § 656.21(b)(5). Accordingly, the CO requested that the Employer fully document why it is not feasible to train someone else at this time or submit evidence that the Alien did have the required qualifications at the time of his hire. Lastly, the CO stated that the Employer's advertisements in a local New Jersey newspaper did not test the New York/New Jersey area adequately and did not result in any qualified applicants; therefore, to rebut, the Employer should indicate a willingness to advertise in a newspaper like the *New York Times* so that the position will attract both New York and New Jersey applicants.

Accordingly, the Employer was notified that it had until July 27, 1995, to rebut the findings or to cure the defects noted.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated July 24, 1995 (AF 80-92), the Employer contended that the job offer has been described with the "absolute minimum requirements as best defined by our needs and is not in any way excessive or restrictive." The Employer stated that the Alien's prior shipping experience made him very much qualified for the job. The Employer contended that the offered position is a New Jersey-based job that starts and finishes each day in Jamesburg, New Jersey, but that the Stock Supervisor must regularly travel to the New York store as a certain amount of inventory and goods in process must be maintained there. The Employer stated that this travel is a normal practice in an apparel organization such as the Employer's which initially developed as a catalog merchandiser and has now built on the name and product recognition to institute retail components. Regarding the training of new employees, the Employer stated that it is "totally unfeasible to train someone for this job as we only have one other Stock Supervisor, Eric King, whose time is devote[d] to the Ralph Lauren side of our business and he cannot stop his needed functions to train someone for this job in our Wathne catalog/retail/production ready to wear business." The Employer also stated that the choice of newspaper for the advertisement was appropriate as the *Home News* has a readership circulation of 63,000 during the week and 75,000 on the weekends in Middlesex and Summerset Counties and the job starts and ends each day at the facility in Jamesburg, Middlesex County, New Jersey. The Employer did, however, agree to readvertise the position if requested, but asked that the job be advertised in an appropriate newspaper such as the *Home News* "as there is no basis to believe that this job has any practical appeal or ability to be performed by someone in New York or North Jersey due to the duplication of travel and its associated hardships of stress and timing."

The CO issued the Final Determination on August 9, 1995 (AF 93-96), denying certification because the Employer failed to rebut § 656.21(b)(2), that the requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the *Dictionary of Occupational Titles* (D.O.T.). Specifically, the CO found that the requirement of working in dual locations is excessive and restrictive. Additionally, the CO found that the Employer has failed to rebut § 656.21(b)(5), that requires the Employer to document that his requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired, nor is it feasible to hire, workers with less training and/or experience. The CO further stated that the Employer failed to document the annual volume of business as directed because the "principals do not permit such disclosure." In conclusion, the CO stated that:

> Although alien did not have experience in the job offered, the employer accepted the alien's skills as qualifying. It is our position that the employer failed to offer the job to US workers under the same conditions that it was offered to the alien. Employer failed to document inability to train, as directed.

On September 11, 1995, Counsel for the Employer requested review of the Denial of Labor Certification (AF 97-112). On October 30, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(5) provides:

> *The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.*

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). Furthermore, an employer must establish that the alien possesses the stated minimum requirements for the position that is being offered. *Charley Brown's*, 90-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (Apr. 7, 1988).

In the instant case, the CO, *inter alia*, challenged the Employer's experience requirements as being unduly restrictive, as the Alien, himself, did not have experience in all of the job duties prior to his hire. Specifically, the CO noted that the Alien did not have experience "directing the back room operation of a clothing and luggage retail store, did not have experience with deliveries, maintaining inventory and shipping records by supplier, delivery carrier and cross indexing to purchaser." (AF 77). An examination of the Alien's work history reveals that the CO correctly found that the Alien did not have such experience when hired by this Employer (AF 1). Thus, the CO concluded that the Employer must have trained the Alien in these duties. To remedy this defect, the CO directed the Employer either to delete the requirement, establish that the Alien met the experience requirement prior to hire, or to document that it is now not feasible to offer the same training to a U.S. applicant that it had afforded the Alien.

We agree with the CO that the Employer clearly has not documented that the Alien had such experience prior to his hire. Instead the Employer merely asserted that the Alien's prior experience made him qualified to perform the current job duties.

As to the infeasibility to train, the Employer merely asserted that it had not trained the Alien and could not train a new employee. In order to prove infeasibility to train, the CO required the Employer to provide certain information including "change in total work force and annual financial volume of business from the time alien was hired and trained until present." (AF 3). The Employer responded that, "[i]n regard to the annual volume of business we respectfully cannot at this time supply said information as this is a closely held private corporation and the principals do not permit such disclosure." Clearly the change in total work force and annual financial volume of business from the time of the Alien's hire to present are relevant factors to be considered in determining whether it is infeasible for the Employer to now offer the same favorable terms to U.S. applicants as it offered to the Alien when he was first hired.

Section 212(a)(14) of the Immigration and Nationality Act of 1952 (amended by § 212(a)(5)(A) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) was enacted to exclude aliens competing for jobs American workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F.2d 666, 669 (9th Cir. 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979). To achieve this Congressional purpose, the regulations set forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible. Twenty C.F.R. § 656.2(b) quotes § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, as follows:

> *Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act...*

The legislative history of the 1965 Amendments to the Act establishes that Congress intended that the burden of proof for obtaining labor certification be on the employer who seeks an alien's entry for permanent employment. *See* S. Rep. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

20 C.F.R. § 656.2(b).

In this case, the Employer's refusal to provide the CO with relevant information is fatal to the application for labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, dissenting:

I respectfully dissent. In order to show a business necessity, the employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing in a reasonable manner the job duties as described by the employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). I believe the Employer has met that standard. I'm impressed by the fact that the Employer, in describing the 50-mile "commute," is merely describing what takes place in his business. While the Employer's mere statement that this is a usual practice in the industry need not be taken at full value, nevertheless, the Alien's job with the Employer does, in fact, cause him to make such commute. I assume that the Employer uses good business methods and would not require an unnecessary loss of time in travel were it not essential for the business. Moreover, it makes sense to locate a warehouse in less expensive New Jersey, with the retail outlet in congested, shopping mecca in New York City. The Employer has gone to great lengths to explain his business and to provide the necessary information to the CO on this issue. The requirement was not tailored to meet any specific experience of the Alien or to set up a discouragement for U.S. workers. The documentation requirement of an hour-by-hour breakdown of the job duties is not a basis for denial of certification since, in light of the Employer's explanations, the job varies from day to day, but requires substantial commuting. I believe that the Employer has met the test of obtaining reasonable documentation set out in *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*).

Similarly, the CO's basis for denial based on failing to offer the job on the same conditions that it was offered to the Alien is not persuasive. As set out at length by the Employer, the Alien's past experience was similar to his current job with the Employer. I quote at length from the Employer's rebuttal (AF 90):

> It is our position that a minimum of two years experience is an absolute business necessity for this job. The reason for this is that without such experience one simply does not possess the knowledge and coordination of inventory/shipping/receiving systems. In the instant case we did not train Mr. Torres as he worked for some two years as a supervisor at Just Packaging during which he performed the same sort of supervision skills in the direction and processing of inventory (products brought in for shipment), shipping (carrier selection, records, follow up) and receiving (intake of items to be shipped with necessary records and inventory input/stocking). Our business is more commercial but nevertheless involves that [sic] same functions as the majority of our shipping is in fulfillment of our catalog orders to individual customers and the receiving/inventory is larger and more involved in terms of coordination and control but does not utilize the same skills that Mr. Torres acquired at Just Packaging. In fact the experience at a facility like Just Packaging is actually very good as such operations survive on the ability to turn around a product receipt, short term inventory and shipment coordination on a rapid high volume basis. Mr. Torres was not a packer at Just Packaging but did supervise some 15 people in this receiving/inventory/shipping function. These skills are a 'commodity' of sorts and are transferable to a wide variety of merchandise. At Just Packaging Mr. Torres dealt with whatever product was being processed. In our business we

> deal with ready to wear, although the skills are the same and it is not necessary to be limited to backroom operation of clothing or luggage. Should you feel that the ETA7-50A should be modified at item 14 for related experience we shall be happy to do such; although do not see the distinction in job skills.

I have quoted at length to indicate the apparent good faith and knowledge of the business by the Employer, as well as the fact that the Alien had had prior experience in the job opportunity, albeit in a different industry. I might have preferred that the CO had taken up the Employer's offer to readvertise, and perhaps on a wider basis, including a New York newspaper. However, while the CO had earlier contended that the New York Times should also be used for advertising, she had not given failure to do so as a reason for proposed denial in the NOF. The Employer, thus, was not given an opportunity to rebut or remedy the issue through advertising.

Finally, I agree that the Employer did not document the annual volume of business as directed because "principals do not permit such disclosure." Even in today's litigious society, a stronger basis should have been given by the Employer for refusing to make such information available were it necessary to the determination of this matter. The Employer, however, has documented the number of employees in the company, their location, and the nature of most of their duties. The additional information requested for documentation and refused is of little, if any, value in the determination of the issues raised by the CO, and its revelation would be irrelevant to this determination. The CO has not given a valid reason why such requested documentation was necessary.

As stated, *supra*, while I could have preferred a better testing of the U.S. market and remain unconvinced that there are not U.S. Stock Supervisors available and willing to work for the wages offered in the New York City area, the CO has not given valid reasons for denial of certification. Stated differently, the Employer has made a good-faith effort to test the U.S. job market and has responded satisfactorily in documenting the matters requested by the CO concerning the issues on which certification was denied. I would remand for granting of certification.

/s/
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.